BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-42-C

In the Matter of	)
	)
Joint Petition for Arbitration of	)
	)
NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC. KMC TELECOM V, INC., KMC TELECOM III LLC, and XSPEDIUS COMMUNICATIONS, LLC on Behalf of its Operating Subsidiaries XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF CHARLESTON, LLC, XSPEDIUS MANAGEMENT CO. OF COLUMBIA, LLC, XSPEDIUS MANAGEMENT CO. OF GREENVILLE, LLC, and XSPEDIUS MANAGEMENT CO. OF SPARTANBURG, LLC	)
	)
Of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)

JOINT RESPONSE AND OPPOSITION OF PETITIONERS TO
BELLSOUTH'S MOTION TO SEVER OR
TO ADOPT PROCEDURAL REQUIREMENTS

NewSouth Communications Corp. ("NewSouth"); NuVox Communications, Inc. ("NuVox"); KMC Telecom V, Inc.("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC

("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") (collectively, "Xspedius") (collectively, the "Joint Petitioners" or "CLECs"), by their attorneys and pursuant to S.C. Code of Regulations R. 103-840, hereby file with the South Carolina Public Service Commission ("Commission") their opposition to BellSouth's Motion to Sever or to Adopt Procedural Requirements. In support of this Joint Response, the Joint Petitioners state as follows:

1. BellSouth's Motion is without merit and should be dismissed or denied. There is nothing improper about the Joint Petition, and there will be no prejudice to any party or the public interest should this matter proceed as a Joint Arbitration. Nor is there any basis for granting BellSouth's request to sever or adopting the procedural requirements proposed by BellSouth. Joint Petitioners acknowledge the merit in having an efficient process, and offer suggestions below that will help the Commission to facilitate an orderly disposition of the issues before it in this Docket. To grant BellSouth's Motion to Sever would serve no legal, procedural or other rational purpose.

2. As explained in their Joint Petition for Arbitration, the Joint Petitioners have filed a joint petition for arbitration as opposed to several individual petitions for arbitration because, in order to maximize limited resources, efficiency, and bargaining power, they conducted consolidated negotiations with BellSouth as a group. Joint Petition, ¶ 12. Notably, the efficiency and benefits that will result from this multi-party arbitration will be shared by the Commission, its Staff and all parties, including BellSouth. Among the efficiencies and benefits that will result from having a single arbitration in lieu of four separate proceedings are:

- One procedural order;
- One issues matrix to track;
- One response to any BellSouth motions;
- One set of discovery to BellSouth;

- One response to any objections by BellSouth to such discovery;
- One hearing;
- One set of briefs; and
- One Arbitration Order.

In short, because there are about 90 issues common to multiple CLECs to be decided in this arbitration proceeding,[1] separate filings and hearings would result in unwarranted expense to the parties and the Commission, as well as unnecessary duplication of efforts and delay.

3. Although it is common for arbitrations under Section 252 of the Communications Act of 1934, as amended ("Communications Act" or "Act") to be between two parties, it also is not uncommon to have Section 252 arbitrations that involve multiple CLECs, such as is the case in this proceeding. Contrary to BellSouth's suggestion, Motion at p. 1, the Act clearly appears to contemplate multiple party negotiations and arbitrations and contains no express preference for arbitrations between a single CLEC and a single ILEC.

4. Indeed, Section 252(a)(1) refers to "a requesting telecommunications carrier or carriers" (emphasis added), indicating that Congress contemplated that these endeavors may involve more than a single CLEC. Section 252(b)(1) states that "the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." In this case, the four CLECs (and their affiliated entities listed in the caption above) that each were a party to the joint negotiations have petitioned the Commission for arbitration jointly. Section 252(b)(2)(A) refers to "a party" and "each of the parties" and contains no directive that the number of parties be limited to two or that joint negotiations be torn apart for the purpose of proceeding to arbitration. Section 252(b)(2)(B) also clearly contemplates that multiple parties may be involved in the same arbitration.

[1] Of the original list of 107 issues, approximately 95 issues remain unresolved at this point. Of those 95, there are only 6 issues that are raised by just one of the CLECs. The other three CLECs simply chose not to arbitrate those issues.

5. Thus, Section 252 does not express a preference as to whether petitioners should file jointly or file separately with the intent to seek consolidation. Moreover, it is clear that that a joint arbitration petition is neither expressly nor implicitly prohibited by the Act (or the Commission's rules or orders).

6. BellSouth's quarrel with the Joint Petitioners is one that elevates form above substance without a sufficient basis to do so. BellSouth alleges that Joint Petitioners would have done better to consolidate "properly filed" separate arbitrations into a single proceeding. Motion, at p. 2. According to BellSouth, the "proper procedure" would have involved four separate petitions, then, following the "proper course", a "proper Motion for Consideration" (presumably) requesting consolidation. *Id.,* at p. 2. BellSouth, however, cites no applicable legal basis mandating this process and provides no other rational foundation for imposing upon its adversaries its self-determined view that tearing apart parties to joint negotiations so that they can then seek to be put back together again for arbitration is somehow "proper" or otherwise required. *Id.* Thus, no real "procedural infirmities" have been alleged or suffered.

7. Indeed, Joint Petitioners respectfully submit that BellSouth's view of what is "proper" would be quite wasteful. For example, if BellSouth took on the burden of filing for arbitration (something it refused to do), the Commission would now likely have four motions (to consolidate) and four oppositions (by BellSouth opposing consolidation) before it instead of the single motion and single opposition it has before it now. Moreover, Joint Petitioners respectfully submit that it would be wasteful to sever and then seek to re-consolidate what already was consolidated. The Joint Petitioners had participated in consolidated joint negotiations all along. Although BellSouth had refused to bless the notion that a Joint Petition for Arbitration likely

would (and did) arise from those negotiations, such blessing was never needed.[2] Notably, parties have pursued actions at the Commission in a joint fashion from the initial filing without the obligation to first file their actions separately and then seek consolidation. For example, in Docket No 2000-378-C, TriVergent Communications (predecessor to Petitioner NuVox), Petitioner NewSouth, and the Southeastern Competitive Carriers Association ("SECCA") jointly filed a complaint with the Commission.

8. Despite BellSouth's attempts to create confusion and concern, the plain and simple fact is that a proceeding with one petition, one response, one set of procedural orders, one set of discovery, one set of briefs, one hearing and one decision will result in economies and efficiencies that will be realized by the Commission and all parties. The Joint Petition contains about 85 issues common to all parties. With respect to these 85 issues, CLECs have jointly submitted a position statement (see Joint Petition and Joint Issues Matrix). Obviously, it will be more efficient to decide these issues once, as opposed to four times. Of the remaining 10 issues, there are 4 that are common to multiple CLECs and 6 that are common only to one CLEC and BellSouth.[3] What distinguishes these 10 issues from the other 85 is that one or more of the Joint Petitioners opted not to arbitrate these 10 issues – not that the CLECs have different positions on these issues. Nevertheless, where more than one CLEC is arbitrating the issue (whether it be two or three CLECs), those CLECs have jointly adopted a position statement. In short, there is a

[2] In their Joint Petition, Joint Petitioners did not imply that BellSouth had either agreed to a Joint Petition or waived its right to object. Thus, BellSouth's assertion in this regard, *see* Motion, Page 3, appears to be a case of BellSouth creating a concern where none exists.

[3] Although there can be no guarantee, Joint Petitioners believe that, given the current course of ongoing discussions with BellSouth, it is likely that as many as 8 of these 10 issues will settle before hearing.

single CLEC position for each and every issue.[4] Thus, Petitioners have addressed the first of BellSouth's three stated concerns. *See* Motion at pp. 5-6.

9. BellSouth's second and third concerns are tied to its unjustified insistence that Joint Petitioners are somehow required to promise *all* of the efficiencies of one proceeding (with one Petitioner instead of four Petitioners) will result with respect to the filing of testimony by Joint Petitioners[5] and the cross-examination of BellSouth's witnesses by Joint Petitioners. BellSouth's concerns are misplaced. First, Joint Petitioners easily can agree that they will have only one attorney representing Joint Petitioners cross-examine a BellSouth witness on any given issue, or sub-issue, as the case may be. Thus, Petitioners have addressed the second of BellSouth's stated concerns. *See* Motion at p. 6.

10. With respect to testimony filed on behalf of each of the Joint Petitioners, BellSouth appears to presume that the Joint Petitioners should become one company and should file as a single entity. Motion at pp. 4-5. The Joint Petitioners, however, are in fact not a single entity.[6] Each CLEC is an independent company with different circumstances and experiences to testify upon in support of the common positions adopted by the Joint Petitioners.

11. BellSouth's suggestion that one CLEC party should have filed and the others should simply wait to adopt the agreement that results from this arbitration is again based solely

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[4] Joint Petitioners note that approximately 10 issues have been resolved by the parties since the Joint Petition was filed and that the Joint Petitioners actively are working with BellSouth to negotiate resolutions to additional issues. A revised Joint Issues Matrix will be filed to reflect and inform the Commission of those issues that it no longer needs to arbitrate.

[5] While, by its very nature, a proceeding involving four petitioners almost certainly will be more efficient than four separate ones, by virtue of its inclusion of multiple independent entities, a proceeding involving four petitioners almost certainly will be more complex than a proceeding involving only one. However, just because this proceeding is likely to be modestly more complicated than a proceeding involving a single petitioner and a single respondent does not mean that it would be prudent to replace it with four separate and largely redundant proceedings.

[6] Although two of the four CLECs – NewSouth and NuVox – recently announced an agreement to merge, it remains likely that there will be at least three independent CLECs as petitioners at the time this proceeding

on what BellSouth views is proper, without any legal foundation or other support. Motion, at p. 7. Moreover, it is disingenuous. Unless each of the Joint Petitioners filed for arbitration, each faced the prospect of being ejected from its current interconnection agreement into the standard BellSouth interconnection agreement.

12. As BellSouth is well aware, each of the Joint Petitioners have roughly 90 points of disagreement with BellSouth's standard interconnection agreement, not to mention the dozens (if not hundreds) of issues raised with respect to the BellSouth standard agreement that were resolved through active negotiations. In addition, BellSouth has been and remains well aware that each of the Joint Petitioners will have separate and different (there are four versions of Attachment 3) interconnection agreements at the far end of this proceeding. Thus, the Commission must rebuff BellSouth's attempt to forge a single entity where there are four, each with their own legal rights and obligations.

13. All this is not to say that the Joint Petitioners are not amenable to procedures that will streamline this proceeding. As stated in the Joint Petition, "[n]o CLEC party takes a position adverse to the position taken by the other CLEC." As indicated on the Joint Issues Matrix, Joint Petitioners have offered a single "CLEC Position" for each and every issue. Joint Petitioners also stated in the Joint Petition that they intended to use, to the fullest extent possible, a "team" witness approach. In subsequent discussions with BellSouth on this issue, Joint Petitioners fleshed out their "team" proposal, which would entail the use of panels containing witnesses from each CLEC that joined in raising an issue being open to cross-examination by BellSouth (BellSouth could choose whether to address the panel or individual witnesses) on an issue-by-issue basis.

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reaches hearing.

14. BellSouth, however, expressed a preference against multi-party panels and in favor of cross-examining CLEC witnesses, one CLEC at a time. That alternative approach also would be acceptable to CLECs. In that approach, the use of panels would be limited to instances where a CLEC had multiple witnesses to cover the various subparts or technical and policy related concerns raised with respect to an issue. That approach, however, did not satisfy BellSouth.

15. To address BellSouth's concerns regarding having to read four separate sets of substantially similar, harmonious, complementary and often redundant testimony, Joint Petitioners also informed BellSouth that they will file consolidated and integrated Joint Testimony encompassing all testimony on all issues. Such Joint Testimony would list all CLEC witnesses on the cover (likely 2-3 per CLEC) and inside would set out by company which witnesses were sponsoring what. Some answers would be sponsored by a witness from all companies, some by fewer than all. The Joint Testimony at its beginning would include a section introducing by company each witness, with appropriate biographical information and qualifications, and a paragraph listing the answers he or she sponsors. To facilitate such identification, answers to questions would be numbered. To make it easy for the Commission, staff and all parties to follow, CLECs would include at the end of each numbered answer an indication of which company witnesses are sponsoring the answer (*e.g.*, [Sponsored by: M. Johnson (KMC), J. Jennings (NewSouth), H. Russell (NuVox), J. Falvey (Xspedius)]). This proposal will create a composite document that will be easy to read and track and that will alleviate the need for paper shuffling and comparison of four sets of entirely separate testimony.

16. BellSouth's headquarters also rejected this proposal and continues to insist that each petitioner should be stripped of its right to present evidence in support of the Joint Petition.

Each of the Joint Petitioners has declined to voluntarily agree to give up its right to present company-specific testimony in support of the Joint Petition. As stated above, where they can speak with one voice they will do so by having multiple witnesses sponsor the same testimony. However, each CLEC is an independent company with different circumstances and experiences to draw upon in support of the common positions adopted by the Joint Petitioners. Joint Petitioners have proposed an eminently reasonable, accommodating, streamlined and orderly way of presenting that testimony and should be afforded their right to present evidence in support of their Joint Petition. With this solution, Joint Petitioners have addressed BellSouth's third stated concern as well and as fully as can be reasonably expected (it is unreasonable to insist, as BellSouth does, that independent entities must cease being so and forgo their right to provide testimony in support of the Joint Petition).

WHEREFORE, the Joint Petitioners respectfully request that the Commission dismiss or deny BellSouth's Motion to Sever or to Impose Procedural Requirements, and grant any other relief as the Commission may deem just and proper.

Respectfully submitted,

/S/

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